VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

The Jury System Again.

In some recent issues of the REGISTER the jury system has been attacked, as some think, rather too severely, and it has been tated that our harsh opinion of this "bulwark of liberty" is not shared by any considerable number of the profession. In light of this it will be interesting to know how the system is regarded in the country from which it was derived, for while the following from the *London Law Journal* is in the nature of a defense of trial by jury, it is admitted that some urge that trial by jury should be swept away. It is said:

"Signs are not wanting of some slackening in the old English belief in the value of trial by jury. Several years ago, before his promotion to the Bench, Mr. Justice Jelf urged the abolition of trial by jury in civil cases, and not long afterwards Mr. Henry Manisty, speaking as President of the Law Society, contended that the time-honoured institution had become a hindrance, rather than an aid, in the administration of justice. The great weight of expert opinion, however, is unmistakably on the side of trial by jury. Not only have distinguished judges like Sir Alexander Cockburn, Lord Coleridge, Lord Russell of Killowen, and Lord Halsbury testified to the utility of the system; the case for trial by jury was admirably stated by the Common Law Commissioners of 1853, who attached much importance to the fact that it popularised the administration of the law. This view was once well expressed by the late Lord Coleridge in addressing a grand jury at Exeter. 'I believe,' he said, 'that much of the satisfaction which I hope and trust does exist with our administration of justice may be traced to the large infusion of what I may call the popular element, and the popular element in the administration of our system of justice is the jury.' Trial by jury may, of course, be attacked on theoretical grounds. 'Who amongst us, having a dispute with his neighbor, would dream of calling in twelve men haphazard from the street to determine it?' Questions of this description are easily put. Would not the separation of the mass of the community from any share in the work of the Courts tend to impair the confidence of the public in the

administration of justice? This is a question of much graver moment, and one that is too often overlooked by those who, affected by the occasional vagaries of juries, urge that the jury system should be swept away."

Power of Supreme Court to Enforce Its Decrees.

At this term of the United States Supreme Court, the case of Virginia against West Virginia will come up for hearing on the merits. The great difficulty is as to the power of the court to enforce against a state a decree for the recovery money, for here there is no collateral that can be sold as in Dakota *v.* North Carolina, 192 U. S. 318, and it is certain that the supreme court has not the power to direct a tax to be levied for the payment of the decree; a levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature. But in the language of Justice Blair in Chisholm *v.* Georgia, 2 Dallas 451, and of the Chief Justice in Virginia *v.* West Virginia, it is not to be presumed that West Virginia will refuse to carry out the decree of this tribunal. Chief Justice Fuller said: "If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced." The court, however, nowhere intimates what means might be employed, if it had any in mind, and our own supreme court has decided that it would not decree specific performance of a contract for the sale of whiskey in a United States warehouse, because the court could not enforce its decree. The sheriff would have no right under the decree to enter the United States warehouse.

In July-August *American Law Review,* George C. Lay, in an able article entitled "The Power of the Supreme Court to Enforce Its Decrees," comes to the conclusion that the states, in giving the Supreme Court jurisdiction over controversies between the states, thereby surrendered so much of their sovereignty as obstructed the court in the enforcement of its decrees and mandates, but admits that as yet Congress has prescribed no remedy for enforcing its mandate. So that after all there is no real power in the court, but it depends on the graciousness of the

defendant state, though as it was said in Chisholm *v.* Georgia, 2 Dallas 452, "Is it altogether a vain expectation, that a state may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the supreme court of the United States, though not conformable to their own ideas of justice?"

In this article Mr. Lay says:

"There is, however, another class of cases of which the Supreme Court has jurisdiction, where State sovereignty is interposed as an obstacle in the path of the Supreme Court and the President in the execution of the laws of the land.

"Under the Federal Constitution and laws of Congress, the Supreme Court has original jurisdiction over controversies between States, and the commonwealths forming our union may institute and prosecute suits directly against each other in that Court without any restriction or limitation whatever, although the Court has always declined to assume jurisdiction in political controversies.

"In a recent case the State of South Dakota brought suit in the Supreme Court against the State of North Carolina (192 U. S. 286), to secure a money judgment upon bonds issued by the latter State, and the Court avoided decision of the question, which was fully discussed, whether the Court had power to direct judgment against North Carolina for a sum of money and enforce collection by selling the property of the State through the ordinary process of execution, where the Sheriff is commanded to seize and sell at auction the property of a judicial debtor.

"The Court preferred to direct the sale of certain securities held as collateral to the bonds, at the east front door of the Capitol Building at Washington, and reserved the question of the power of the Court to enforce a money judgment against a State, until they were absolutely compelled to decide it.

"The same question will probably be presented in the case of Virginia against West Virginia, instituted a few months ago in the Supreme Court, in which it is sought to compel West Virginia to pay a proportionate part of the public debt of Virginia contracted before the dismemberment of the Old Dominion in 1861.

"There are undoubtedly great embarrassments and difficulties

in enforcing a money judgment against a State. The property of a State, county or municipality is declared to be exempt from seizure and sale by a sheriff for the nonpayment of a judgment, because she holds such property in trust for public purposes (Meriwether *v.* Garrett, 102 U. S. 472; Rees *v.* City of Watertown, 19 Wall. 107), and the spectacle of the seizure by a sheriff of the pictures, trophies and furniture in the capitol of a State or in the City Hall, is repugnant to all sense of State or civic pride.

"It has also been decided that the Supreme Court has no power to direct the State authorities to lay a tax upon the landed property of the State or the personal property of her citizens, and thus raise money to pay a judgment. (U. S. Guthrie, 17 How. 184).

"In such cases, it is clear that if the Supreme Court has no powers to seize and sell the property of a sovereign State, or compel the raising of money to pay a judgment, the President is equally without authority.

"It is claimed by respectable authorities that a sovereign State cannot be compelled to pay her debts, and that her sovereignty is a bulwark against which the public creditor or an opposing State may struggle in vain.

"Alexander Hamilton on this subject in the Federalist (No. 81) said:

" 'The contracts between a nation and individuals are only binding on the conscience of the sovereign, and can have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against states for debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State.'

"In the celebrated case of Kentucky *v.* Dennison, Governor of Ohio (24 How. 66, 107), it was decided that the Governor of Ohio was not bound to deliver a fugitive from justice to the Kentucky authorities, even though an Act of Congress made it the duty of the Governor to cause a fugitive to be arrested and delivered up to the demanding State.

"The principle was laid down by Chief Justice Taney, that the Federal Government under the Constitution has no power to impose on a State officer, as such, any duty whatever and compel

him to perform it, for it was declared that such a power would place every State under the control and dominion of the general Government, even in the administration of its internal concerns and reserved rights.

"It is conceded that the Supreme Court may, according to the Constitution, determine the merits of a quarrel between the States, over boundaries, rights of property or public obligations, and settle the form of the judgment, but it is confidently insisted that the authority of the Court then ceases, because there is no power given by the Constitution or the laws of Congress to enforce or carry the judgment into effect. Ordinarily the States submit to the decree of the Court without question. When the boundary question which vexed Rhode Island and Massachusetts for twenty years or more was determined by the Supreme Court, both States instantly accepted the decision as final, and the decree of the Supreme Court fixed the boundary forever.

"But it becomes a practical question how to proceed when a State is defeated in a controversy with a sister State and does not bow in humble submission to the supreme authority, but declines to pay a judgment, refuses to take necessary steps to raise the money, or wholly disregards the Court and its proceedings.

"There is no open defiance, or hostility, or armed resistance, the State simply takes the position of silence, passivity and inaction.

"Face to face with this practical question, the fine phrases of the jurists illuminate the subject, but do not solve the problem.

"Chief Justice Marshall declared, 'If the State Legislatures may annul the judgments of the Courts, the Constitution becomes a solemn mockery.' (U. S. *v.* Peters, 5 Cranch. 115, 135.)

"Justice Baldwin said 'it was monstrous to talk of existing rights without corresponding remedies.' (Rhode Island *v.* Massachusetts, 12 Pet. 657, 744.)

"And Justice Clifford stated the universal rule that, 'if the power is conferred to render a judgment, it also includes the power to issue proper process to enforce it.' (Riggs *v.* Johnson County, 6 Wall. 166, 187.)

"Justice Baldwin also said it was not to be presumed, 'that any State would either do wrong or deny right to a sister State, or

her citizens, or refuse to submit to the decrees of the Court rendered pursuant to her own delegated authority.' (Rhode Island *v.* Massachusetts, 12 Pet. 654, 751.)

"In our view, there is irresistible force in the position that the States by the adoption of the Constitution clothed the Supreme Court with jurisdiction over controversies between the States, including those over title to property and public obligations, and thereby surrendered so much of their sovereignty as might otherwise obstruct the Court in the enforcement of its decrees and mandates. Therefore, when it is said that the sovereignty of the States stands in the way of the collection of a public debt of the State, because neither the Supreme Court nor the executive has the power to interfere with or control the administration of her financial affairs, the answer is that the State surrendered her sovereignty in this respect by conferring jurisdiction upon the Supreme Court to determine interstate controversies.

"The question of State sovereignty being disposed of, it remains to find a remedy for embarrassing conditions. If the power to enforce its own decrees does not rest in the Supreme Court, Congress is given authority by the Constitution to 'make all laws which shall be necessary and proper for carrying into execution the powers of Congress and all other powers vested by the Constitution in the Government of the United States, *or in any department or officer thereof.*'

"On this foundation Chief Justice Marshall built his temple of implied powers in McCullough *v.* Maryland (Wheaton 316), and paved the way for modern forces to tread with confidence and strength.

"If the Supreme Court is hampered in the execution of its powers, Congress is able to supply the omission, regulate the procedure of the Court, and prescribe the mode of carrying into effect its judgments and decrees, and the execution of its writs and mandates. There are broad-minded statesmen at work upon the task of remoulding legislation so as to meet conditions fraught with peril or embarrassment to the Government or any of its departments.

"In the time of peace and good will among the States, Congress should be urged to pass a law which shall give the Supreme Court

the power to execute its decrees in any case of interest controversy. Such legislation would not, in my opinion, be repugnant to the Constitution on the ground of interference with the sovereignty of the States, but would afford a simple remedy for an established right."

Injunctions.

In a Virginia court a few weeks ago an attorney quoted from "High on Injunctions." An old attorney present muttered in a voice which extended further than he anticipated, "If the writ keeps on being used as it has been in the last six months it will be High, Low, Jack, and the Game." A large number of the Attorney Generals of the Southern and Western States seem to have assumed that this would be the case, for they lately held a meeting in the city of St. Louis and attempted a sort of Attorney Generals' Trust for mutual aid in bringing suits against corporations and to impress upon Congress the necessity of modifying the writ of Injunction as now exercised by the Federal Courts to prevent the execution of State laws. Of course this action is the outgrowth of the course that the Federal Courts have taken in opposing the reduction by state statutes of the mileage rate for passenger fares. Nearly every one of these statutes in every state where it has passed has been stayed by an injunction granted by the Federal Court and it seems that these Courts have been using—if not to say abusing—the right of an injunction, until it has become no longer an emergency writ but a writ of habitual recourse. Originally intended as a writ framed according to the circumstances of the case, commending an act which the Court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience and only to be used where great or irreparable injury would have ensued but for its issuance, it has now become an every day matter in order to test every conceivable right wherein a possible injury is contemplated. It is a serious question whether the growth of its use even in the state courts has not caused greater injury than the injuries to prevent which its aid has been invoked. We suppose there are very few lawyers in general practice who have not seen the writ abused and injunctions granted without notice to the opposite

party, entailing unwarrantable delay and serious injury and which it needed only an answer and a hearing to promptly have the writ dissolved. The frequency of its use seems to call for some legislative action to prevent its being granted except in the most extreme cases, upon timely notice, and we have very little doubt but what there will be eventually stringent legislation by Congress to regulate its use in the Federal Courts. Might it not be as well, whilst we look at it in its broad use in the interference with the execution of state laws, to scrutinize its use in the smaller matters between man and man?

The Hague Conference.

The Hague Conference has come and gone. Its possibilities for usefulness cannot be over-estimated, and whilst the members of the press are disposed to minimize its work, yet one cannot help thinking that it has accomplished much more than the newspapers give it credit for. When we come to contemplate what it has done, we can forgive it a good deal for its failure to do more. It has provided an international prize court, making an impartial tribunal to pass upon captures at sea hitherto decided by the courts of the country making the capture. It has required a declaration of war before hostilities; it has put a ban upon the bombardment of unfortified places; it has restricted floating mines; it requires a naval officer as commander of any privateer armed for war; and it has added to the security of the wounded on land and sea. It has prohibited the enforcement of claims by the resort to arms, unless arbitration is first offered and refused; and it has added to the powers and responsibilities of neutrals. The United States made a desperate effort to secure the inviolability of private property at sea. England attempted to prohibit floating mines. Brazil and the Argentine Republic attempted to prohibit all force in the collection of claims; and Germany, to lessen blockades.

One of the most interesting questions raised was one which we imagine must have embarrassed the United States somewhat, if the United States was ever embarrassed by being faced with such a thing as an inconsistency; and we can hardly imagine that after the recognition of the secession of Panama in view of its

attitude in 1861, that the United States could ever be embarrassed at anything. The South American powers claimed that if a permanent tribunal for the arbitration of disputed questions between the nations should be established, then all nations should stand upon an equality in the choice of the judges of those courts. This was the question which faced those who created the union of the states, and the Senate, with the equal voting power of little Rhode Island, and the great Commonwealth of what was then Virginia, was one result of the same claim which the South American Republics made at the Hague. We hardly imagine that the United States could with good grace have resisted this claim of the South American Republics, but we can very well see how the monarchies of Europe should have resisted it to the uttermost. At the same time all international lawyers must welcome the work of this tribunal. Heretofore international law has been to a certain extent uncertain and based upon no logical or well-fixed principles. With a tribunal such as the Hague tribunal meeting every seven years we may trust to see some great code of international law enacted for the guidance of the nations; and the relations of all the powers of the world put upon a sure, just, charitable and righteous foundation. The creation of such a tribunal must of necessity be the result of slow growth but we believe it will come in time.